Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Petitioner,

v.

RHEEM MANUFACTURING COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Central States, Southeast and Southwest Areas Pension Fund ("Central States") sought to collect withdrawal liability from Rheem Manufacturing Company, Inc. ("Rheem") because Rheem was a joint employer under labor law with a company that had ceased contributing to Central States. Rheem sued Central States in a declaratory action seeking a ruling that it was not an employer within the meaning of 29 U.S.C. §1381 and hence was not liable for the withdrawal liability. The court below, affirming the district court, ruled that the question was not arbitrable under 29 U.S.C. §1401(a) and that Rheem was not an employer under the statute because it had entered into no contract obligating it to contribute to Central States. Although a contract is one way an employer becomes obligated to contribute to a pension plan, 29 U.S.C. §1392(a)(2) specifies that such an obligation may also arise under labor-management relations law. The court below ignored (even failed to cite) this latter provision, which was the principal issue on appeal.

The questions presented are –

1. May a joint employer be subject to withdrawal liability under 29 U.S.C. §1381 if it has an obligation to contribute under labor management relations law within the meaning of 29 U.S.C. §1392(a)(2), but does not have a signed contract?

2. Is a company that denies it is an employer for purposes of 29 U.S.C. §§1381 and 1392(a) obligated to arbitrate that question pursuant to 29 U.S.C. § 1401(a)?

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I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 63 F.3d 703 and is reproduced at App. 1-10 of the Appendix. The opinion of the United States District Court for the Western District of Arkansas is reported at 873 F.Supp. 173 and is reproduced at App. 11-25 of the Appendix. The decision of the district court on motion to dismiss is reproduced at App. 26-37 of the Appendix. The order relating to the petition for rehearing in the court of appeals is reproduced at App. 38 of the Appendix.

II. JURISDICTION

The district court's jurisdiction was invoked under 29 U.S.C. §1451. The jurisdiction of the court of appeals was invoked under 28 U.S.C. §1291. The judgment of the court of appeals affirming the district court was entered on August 17, 1995. The order of the court of appeals on petition for rehearing was entered on September 22, 1995. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

III. STATUTORY PROVISIONS INVOLVED

§1381. Withdrawal liability established; criteria and definitions

> (a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

§1392. Obligation to contribute

(a) Definition

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising –

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

§1401. Resolution of disputes

(a) Arbitration proceedings; matter subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of –

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title, or

The parties may jointly initiate arbitration within the 180-day period after the date of

the plan sponsor's demand under section 1399(b)(1) of this title.

IV. STATEMENT OF THE CASE

Petitioner Central States, Southeast and Southwest Areas Pension Fund ("Central States") is one of the largest multiemployer pension plans in the United States. *Central States v. Central Transport, Inc.*, 472 U.S. 559, 561, n. 1, 105 S.Ct. 2833, 2836, n. 1 (1985). Rheem Manufacturing Company ("Rheem") is a Delaware corporation that operates a manufacturing facility in Forth Smith, Arkansas. For over twenty years, from approximately June 6, 1965, to approximately June 6, 1991, Rheem leased a group of about fifteen truck drivers from a company called Knight Associates ("Knight"), located in Chicago, Illinois, to haul finished products from Fort Smith to Rheem dealers nationwide. Pursuant to this lease, Knight furnished drivers to operate vehicles for Rheem, and Rheem remitted payments to Knight in accordance with the number of drivers leased and the number of miles driven.

Knight's sole business activity was to act as the employer for employees leased to Rheem; Knight's employees were selected for employment by Rheem. Knight never met or interviewed any of its leased employees prior to their being placed on Knight's payroll by direction of Rheem; Knight was required to hire and lease back to Rheem each person whose name was submitted to Knight by Rheem; Knight had no control over the working conditions of the leased employees; the leased employees did not wear Knight uniforms, or drive Knight trucks, or carry Knight identification; Knight did

not negotiate with the union over the terms and conditions of the leased employees work; Knight signed the collective bargaining agreement proffered by the union (the Teamsters National Master Freight Agreement) pursuant to its agreement with Rheem; Knight had no power to fire or replace any of the leased employees; and Knight would terminate the employment of a leased employee only upon the instruction to do so from Rheem.

Knight's responsibilities under the agreement provided that Knight would pay all wages and provide all benefits required by the applicable collective bargaining agreement. Pursuant to a collective bargaining agreement to which it was a party, Knight made contributions to Central States Pension Fund on behalf of leased drivers.

On or about June 15, 1991, Rheem terminated its agreement with Knight. Knight then ceased its contributions to Central States. Central States notified Rheem that it owed withdrawal liability. Rheem's liability as of September 1994, was $70,063.35.

On March 25, 1994, Rheem commenced this declaratory judgment action under the Employee Retirement Income Security Act of 1974 ("ERISA"), asking the district court to determine whether or not it is an "employer" subject to withdrawal liability under 29 U.S.C. §1381(a).[1] Central States moved to dismiss on the ground that withdrawal liability disputes are committed to arbitration first pursuant to 29 U.S.C. §1401(a), and Rheem failed to

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[1] The withdrawal liability provisions of ERISA were added by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") and are codified at 29 U.S.C. §§1381-1451.

exhaust this administrative remedy. On May 13, 1994, the district court denied Central States' motion to dismiss, holding that Rheem's status as an "employer" under ERISA is properly resolved by a federal court, rather than an arbitrator. Both parties then moved for summary judgment on the central question in the case – whether Rheem is an "employer" for purposes of assessing withdrawal liability.

On December 8, 1994, the district court issued its decision, granting Rheem's motion for summary judgment and denying Central States' cross-motion for summary judgment. On August 17, 1995, the court of appeals affirmed the district court. On September 22, 1995, the court of appeals denied Central States' petition for rehearing.

V. REASONS FOR GRANTING THE WRIT

This is a case where a court of appeals simply disregarded a statute that mandated one result in order that the court might reach the opposite result. The statute in question – 29 U.S.C. §1392(a)(2) – expressly states that an entity may have an obligation to contribute to an employee benefit plan (and hence be an "employer") "as a result of a duty under applicably labor-management relations law." The court below did not even cite this statute, and held in flagrant disregard of § 1392(a)(2), that an obligation to contribute must arise under contract and only under contract before an entity can be deemed an employer. In so holding the court below created a conflict with other circuits regarding the definition of the term

"employer" under Title IV of ERISA. Moreover, it disregarded applicable agency guidance (the Pension Benefit Guarantee Corporation) on that same question in conflict with the decisions of this Court. Finally, in hearing the case at all, the court disregarded the statutory command that disputes between employers and pension plans regarding withdrawal liability be submitted first to an arbitrator. This places multiemployer ERISA benefit plans in a quandary. Many benefit plans – like the Petitioner Central States – must deal with employers throughout the United States. Presumably, most circuits will continue to follow the statute as written and as interpreted by the Pension Benefit Guaranty Corporation. However, employers who, like Rheem, can bring a declaratory action and obtain jurisdiction and venue over a benefit plan in the Eighth Circuit will obtain a different result. The outcome of cases should not depend on geographical happenstance. Further, ERISA benefit plans that operate on a nationwide basis should not be forced to administer the withdrawal liability provisions of ERISA in an uneven fashion – due solely to the location of the withdrawn employer. This imposes an undue burden of the benefit plans, upsets a principal purpose of ERISA (national uniformity), and brings discredit to our federal system.

A. The Decision Of The Court Below Is In Conflict With Decisions Of The Second And Eleventh Circuits On A Definition That Requires Uniform Application Nationally.

The purpose of MPPAA is to help ensure the funding for pensions that have already been promised to (or "vested" in) individual employees. MPPAA accomplishes

this goal by making each contributing employer responsible for a proportionate share of the multiemployer pension plan's vested, but unfunded, pension obligations:

> A pension plan like the one in issue, to which more than one employer contributes, is characteristically maintained to fulfill the terms of collective bargaining agreements. The contributions made by employers participating in such a multiemployer plan are pooled in a general fund available to pay any benefit obligation of the plan. To receive benefits, an employee participating in such a plan need not work for one employer for any particular continuous period. Because service credit is portable, employees of an employer participating in the plan may receive such credit for any work done for any participating employer. An employee obtains a vested right to secure benefits upon retirement after accruing a certain length of service for participating employers . . .
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> * * *
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> ERISA was designed "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in [them]. . . . Congress wanted to guarantee that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he will actually receive it." [*Connolly v. PBGC*], 475 U.S. at 214, 106 S.Ct. at 1020 (citations and internal quotations marks omitted).
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> * * *

> Under certain provisions of the MPPAA (which when enacted had an effective date of April 29, 1980, 29 U.S.C. §1461(e)(2)(A) (1976 ed., Supp. V)), if an employer withdraws from a multi-employer plan, it incurs "withdrawal liability" in the form of "a fixed and certain debt to the pension plan." [*PBGC v. R.A. Gray*], 467 U.S. at 725, 104 S.Ct. at 2715. An employer's withdrawal liability is its "proportionate share of the plan's 'unfunded vested benefits,' " that is, "the difference between the present value of vested benefits" (benefits that are currently being paid to retirees and that will be paid in the future to covered employees who have already completed some specified period of service, 29 U.S.C. §1053) "and the current value of the plan's assets. 29 U.S.C. §§1381, 1391." *Gray, supra*, 467 U.S. at 725, 104 S.Ct. at 2715.

Concrete Pipe & Products v. Construction Laborers Pension Trust, 113 S.Ct. 2264, 2271-2272 (1993).

Mindful of this underlying goal of MPPAA, the courts have developed a definition of the term "employer" (*i.e.*, the party responsible for paying the withdrawal liability) which is keyed to the obligation to contribute.

> [T]he term employer in 29 U.S.C. §1381(a) means a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants.

Korea Shipping Corp. v. New York Shipping Ass'n-Int'l Longshoremen's Ass'n Pension Trust Fund, 880 F.2d 1531, 1537 (2d Cir. 1989); *Carriers Container Council v. Mobile S.S.*

Assn., 896 F.2d 1330, 1343, *cert. denied*, 498 U.S. 926, 111 S.Ct. 308 112 L.Ed.2d 261 (1990) (11th Cir. 1990).

The Second Circuit adopted this definition of the term employer because the statute itself implicitly defines employer in this fashion. Under MPPAA, the triggering event for an employer's withdrawal from a pension plan is the cessation of the employer's "obligation to contribute." 29 U.S.C. §1383(a)(1). Thus, when an entity has an obligation to contribute to a multiemployer pension plan, it is an employer under MPPAA. When the employer *ceases* to have the obligation to contribute, the employer triggers withdrawal liability, and must pay its share of the pension plan's obligation to pay for pension benefits that have vested, but are not sufficiently funded. To determine who may be liable for withdrawal liability a pension plan must determine who had the obligation to contribute.

The statute expressly states that an obligation to contribute may arise as a matter of contract, *or* "as a result of a duty under applicable *labor-management relations law*. . . . " 29 U.S.C. §1392(a)(2) (emphasis added). Thus, not surprisingly, the Second and Eleventh Circuits were willing to accept that either direct or indirect employers may be liable under MPPAA. The court below, however, held that an "obligation to contribute" can *only* be a contractual obligation. This, of course, is clearly inconsistent with the express terms of MPPAA – indeed, the decision does not cite or discuss 29 U.S.C. §1392(a)(2) at all. And, the decision directly conflicts with the decisions of the Second and Eleventh Circuits. Obviously, the second prong of the statute like the second prong of the Second Circuit's definition, does not require a

contract much less a signature on the contract as was held necessary by the court below.

Noting that the Second and Eleventh Circuit cases had involved signed contracts of one kind or another, the court below concluded that a signed contract was necessary to impose withdrawal liability. But the Second Circuit has affirmed withdrawal liability in a case where the liable entity had signed no contract. *Bowers v. Transportacion Maritima*, 901 F.2d. 258, 262 (2d Cir. 1990). And, indeed, other examples of non-signatory obligations under labor law that result in withdrawal liability can readily be found. Those courts that have encountered such obligations have not been troubled by the lack of a contractual obligation to contribute. *See Concrete Pipe and Products v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2274 (1994)(purchaser abides by contract of purchased company); *Chicago Truck Drivers Pension Fund v. Tasemkin*, 59 F.3d 48 (7th Cir. 1995) (successor liability under MPPAA). The insistence of the court below on a signed contract to create a MPPAA employer thus conflicts with both the statute and the other courts of appeals.

This conflict is not inconsequential. Central States assesses hundreds of withdrawn employers every year. And there are about 2,000 plans like (albeit smaller than) Central States. These employers and plans do business in every State. If the definition of employer varies from jurisdiction to jurisdiction, Central States will be unsure whether an entity is an employer when it issues an assessment of withdrawal liability. Only when a lawsuit establishes which circuit's law must be followed, is the

question resolved. Many companies are obligated to contribute to more than one of these pension plans. This raises the possibility of a company being a liable employer in New York to one plan while not liable in Missouri to another plan, although the circumstances are otherwise identical. ERISA sought to impose a uniform regulation of pension plans. The decision of the court below threatens this uniformity.

B. The Court Below Ignored The Interpretations Of The Federal Agency That Oversees MPPAA And Thus Is In Conflict With Decisions Of This Court.

The Pension Benefit Guaranty Corporation ("PBGC") is the federal agency charged by Congress with administering MPPAA. *Connolly v. PBGC*, 475 U.S. 211, 106 S.Ct. 1018, 1020 (1986). In Opinion Letter 85-14 (May 28, 1985), the PBGC stated that a "joint employer" under labor-management relations law may constitute an "employer" for MPPAA purposes – even in the absence of a *contractual* obligation to contribute:

> Under [MPPAA] an *employer* is liable for a withdrawal from a multiemployer plan when it permanently ceases to have an *obligation to contribute* or permanently ceases all covered operations under the plan. Section 4203 of ERISA. [29 U.S.C. §1383.] Section 4212(a) of ERISA [29 U.S.C. §1392(a)] defines 'obligation to contribute' as an obligation arising under one or more collective bargaining agreements *or as a result of a duty under applicable labor-management relations law.* You have represented that your client is an *employer* (*joint employer*) which may have an obligation under the NLRA [National

> Labor Relations Act] to contribute to the Plan. If such an obligation were found to exist, your client would be subject to Title IV's withdrawal liability provisions. Thus, a permanent cessation of its obligation to contribute would constitute a withdrawal from the Plan, and its liability would be calculated in accordance with Section 4201 of ERISA.

PBGC Opinion Letter 85-14 (May 28, 1985) (Appendix at App. 40; emphasis added). *See also* PBGC Opinion Letter 86-10 (April 10, 1986) (Appendix at App. 42). These PBGC Opinion Letters are entitled to considerable weight and deference by the federal courts. *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 646, 110 S.Ct. 2668, 2676, 110 L.Ed.2d 579 (1990) (*Chevron* deference appropriate for opinion letters); *see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984).

In holding that only a signed contract may establish an employer's obligation to contribute, the decision of the court below flatly contradicts these PBGC Opinion Letters. As a result, the decision, if left unmodified, places the Eighth Circuit at odds with national pension law policy as articulated by the federal agency charged with interpreting the relevant statute.

C. The Court Below Ignored The Statutory Mandate Of Arbitration First.

MPPAA at 29 U.S.C. §1401(a)(1), requires that *"[a]ny* dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination under sections 1381 through 1399 shall be resolved through

arbitration." (Emphasis added.) The court below reasoned that the arbitrator has jurisdiction only over *employers*, and therefore a United States District Court must first determine whether a putative employer is in fact an employer before the arbitrator may have the case. The courts of appeals, however, uniformly agree that arbitrations under 29 U.S.C. §1401 are prudential. That is, Courts defer to arbitration under 29 U.S.C. §1401 due to the doctrine of exhaustion of administrative remedies. *McDonald v. Centra, Inc.*, 946 F.2d 1059, 1063 (4th Cir. 1991), *cert. denied*, 504 U.S. 968, 112 S.Ct. 2325 (1992) ("the text of the MPPAA indicates only that arbitration is compulsory"); *Robbins v. Admiral Merchants Motor Freight*, 846 F.2d 1054, 1056 (7th Cir. 1988); *IAM National Pension Fund Ben. Plan C. v. Clinton Engines Corp.*, 825 F.2d 415, 417 (D.C. Cir. 1987); *Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund*, 693 F.2d 290, 293 (3d Cir. 1982). One of the exceptions to the doctrine of exhaustion arises if the case involves a purely legal question. *IAM National Pension Fund v. Stocton TRI Industries*, 727 F.2d 1204, 1210 (D.C. Cir. 1984). Thus, under *Stocton TRI*, the district court might, but need not, take the purely legal question of whether a joint employer (like Rheem) may, solely by virtue of the joint employer relationship, be a MPPAA employer. But if a joint employer can, in principle, be liable as an employer under MPPAA as argued above, then any question of whether the putative employer is *in fact* a joint employer must be heard (tried) by the arbitrator. *See ILGWU National Retirement Fund v. Levy Bros. Frocks*, 846 F.2d 879, 886 (2nd Cir. 1988). Otherwise, the district court would be required to hold a preliminary trial to determine whether a case may be

arbitrated. Such a result would defeat the purposes of the exhaustion doctrine and of 29 U.S.C. §1401. This would, under the standards set by Congress in MPPAA, make for imprudent and inefficient administration of justice. Congress clearly intended that *factual* questions in MPPAA disputes would be resolved by means of arbitration, 29 U.S.C. §1401, and, indeed, specified that *any dispute* over withdrawal liability be so resolved. To ensure that the lower courts defer to Congress' mandate, this Court should issue a writ of certiorari.

VI. CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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December 21, 1995

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1073

Rheem Manufacturing Company, Appellee, v. Central States Southeast and Southwest Areas Pension Fund, Appellant.	*	Appeal from the United States District Court for the Western District of Arkansas.

Submitted: May 15, 1995

Filed: August 17, 1995

Before MAGILL, Circuit Judge, HENLEY, Senior Circuit Judge, and LOKEN, Circuit Judge.

MAGILL, Circuit Judge.

In this case arising under the Multi-Employer Pension Plan Amendments Act (MPPAA), 29 U.S.C. §§ 1381-1453 (1985), Central States Southeast and Southwest Areas Pension Fund appeals from the district

court's[1] denial of its motion to dismiss and the district court's grant of summary judgment to Rheem Manufacturing Company. We affirm.

I. BACKGROUND

In July 1965, Rheem Manufacturing Company, a manufacturer of heating and air conditioning equipment based in Fort Smith, Arkansas, entered into a lease agreement (Agreement) with Knight Associates, whereby Rheem leased approximately fifteen truck drivers from Knight to distribute its products. Under the Agreement, Knight provided truck drivers to Rheem, and Rheem paid Knight weekly for the total number of drivers and miles driven.

Knight's responsibilities under the Agreement included contributions to Central States Southeast and Southwest Area Pension Fund (Central States), pursuant to a collective bargaining agreement with the drivers' union. The Agreement stated that "the drivers are, and will continue to be, [Knight's] employees. [Knight] will pay the drivers' wages and provide all of the benefits required by any applicable collective bargaining agreement which may be in effect. . . . " Driver Service Agreement, July 1, 1965, at 3. Knight and not Rheem, was signatory to the collective bargaining agreement establishing the obligation to contribute to Central States. Rheem's responsibilities under the Agreement included selection and supervision of the drivers and negotiations

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[1] The Honorable H. Franklin Waters, Chief Judge, United States District Court for the Western District of Arkansas.

with the union regarding the terms and conditions of the drivers' work.

In keeping with the terms of the Agreement, during the period in which Rheem was leasing drivers from Knight, Knight made contributions to Central States. In June 1991, Rheem terminated its Agreement with Knight, and thereafter entered into a similar business relationship with Leaseway Personnel Corporation. Knight ceased payment of its contributions to Central States, and Central States notified Knight that it had incurred withdrawal liability, under 29 U.S.C. § 1381 (1985), in the amount of $80,435.96.[2] Knight, in liquidation, paid only $21,182. Central States then sought to collect the balance of the withdrawal liability from Rheem. Rheem asserted that it was not an "employer" under the MPPAA, and therefore not statutorily responsible for withdrawal liability. Central States asserted that Rheem was a joint employer with Knight, and therefore was responsible for withdrawal liability.

This conflict led to Rheem filing an action for declaratory judgment in the district court on March 25, 1994, seeking a determination of whether Rheem is an "employer" under the MPPAA. Central States brought a motion to dismiss, alleging that Rheem was obliged to submit the issue to arbitration under 29 U.S.C. § 1401 (1985), which was denied by the district court. Each party

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[2] Section 1381(a) states that: "If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability."

then submitted a motion for summary judgment, and the district court granted summary judgment to Rheem, finding that Rheem was not an "employer" for MPPAA purposes, and therefore could not be liable for withdrawal payment. This appeal followed.

II. DISCUSSION

Central States appeals two issues: first, whether the district court erred in denying Central States' motion to dismiss based on a statutory arbitration requirement; second, whether the district court erred in granting summary judgment to Rheem, finding as a matter of law that Rheem was not an "employer." We address each issue in turn.

A. Arbitration Requirement

Central States argues that the declaratory judgment action was improperly before the district court because the MPPAA requires that: "Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration." 29 U.S.C. § 1401(a)(1).

Several of our sister circuits have stated that the determination of whether an entity ever became an employer under the MPPAA is an issue properly addressed by a district court prior to arbitration of any remaining issues:

> [There is] a third narrow exception to the arbitration requirement. This exception allows a

> company to bypass arbitration for the limited purpose of determining whether it is an "employer" within the meaning of section 1401(a)(1). This conclusion follows from the language of that section, which states that arbitration shall govern disputes between an "employer" and the plan sponsor. Since only an "employer" is required to arbitrate, the district court may address this threshold question before arbitration.

Mason & Dixon Tank Lines, Inc. v. Central States Pension Fund, 852 F.2d 156, 167 (6th Cir. 1988) (collecting cases); *see also Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 122 (4th Cir. 1991); *Banner Indus. v. Central States Pension Fund*, 875 F.2d 1285, 1293 (7th Cir.), *cert. denied*, 493 U.S. 1003 (1989); *Board of Trustees of Trucking Employees of N. Jersey Welfare Fund, Inc., – Pension Fund v. Centra*, 983 F.2d 495 501 (3d Cir. 1992).[3]

The sole question presented to the district court by Rheem's action for declaratory judgment was whether

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[3] Several courts have held that this exception to the arbitration requirement only applies when the entity asserting that it is not an employer asserts that it has never been an employer in the MPPAA context, or that it did not become an employer until after the withdrawal liability had been acquired. *See, e.g., Teamsters*, 947 F.2d at 123 ("as long as a withdrawing entity was a part of the control group of an employer subject to the MPPAA *at some point in time*, and where the issues in dispute fall under provisions explicitly designed for arbitration, the arbitration procedure must be followed"); *Trucking Employees of N. Jersey*, 983 F.2d at 501. Rheem asserts that it has never been an employer, and we do not address the question of arbitration in the context of an entity asserting that it was, but no longer is, an employer.

Rheem was an "employer" under the MPPAA.[4] We agree with the reasoning of the Sixth Circuit, quoted above. Section 1401 applies to disputes between employers and plan sponsors; since the district court was deciding *whether* Rheem was, or ever had been, an employer, § 1401 does not apply to Rheem's action for declaratory judgment. We therefore find that the district court did not err in denying Central States' motion to dismiss.

B. "Employer" Status Under the MPPAA

Central States argues that the district court erred in granting summary judgment to Rheem, finding that Rheem was not an "employer" for MPPAA purposes, and therefore could not be liable for withdrawal payment under § 1381. We review a district court's grant of summary judgment applying the same standard as the district court. *Berdella v. Delo*, 972 F.2d 204, 209 (8th Cir. 1992). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* (citing Fed. R. Civ. P. 56(c)).

The MPPAA does not provide a definition of "employer." In *Seaway Port Authority v. Duluth-Superior ILA Marine Ass'n Restated Pension Plan*, 920 F.2d 503 (8th

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[4] Central States asserts that the court found that Rheem was a joint employer in its memorandum opinion granting Rheem's motion for summary judgment. On the contrary, the opinion explicitly states that "the court emphasizes that it has not made any ruling that Knight and Rheem are joint employers. . . . " Mem. Op., Dec. 8, 1994, at 10.

Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991), a panel of this Court, in a matter of first impression in this circuit, established a definition of "employer" for MPPAA purposes. We adhere to that definition in the instant case, and find that the district court correctly found that Rheem was not an employer under the MPPAA.

In *Seaway*, we joined the Second and Eleventh Circuits in holding that, for MPPAA purposes, the definition of "employer" is " 'a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants.' " *Id.* at 507 (quoting *Korea Shipping Corp. v. New York Shipping Ass'n – Int'l Longshoremen's Ass'n Pension Trust Fund*, 880 F.2d 1531, 1537 (2d Cir. 1989)); *see Carriers Container Council, Inc. v. Mobile Steamship Ass'n – Int'l Longshoreman's Ass'n, AFL-CIO Pension Plan & Trust*, 896 F.2d 1330, 1343 (11th Cir.), *cert. denied*, 498 U.S. 926 (1990). In applying this definition, "the appropriate inquiry is whether the alleged employer had an obligation to contribute and what was the nature of that obligation." *Seaway*, 920 F.2d at 508. We found, after review of the case law applying the *Korea Shipping* definition of "employer," that there was "one fact common to all of the parties held subject to withdrawal liability; *they were contractually bound to make pension contributions*, either in collective bargaining agreements, general cargo agreements, or shipping association agreements." *Id.* at 509. The nature of the obligation to contribute establishing an entity as an "employer" for MPPAA purposes, therefore, is contractual, and the party who is signatory to a contract creating the obligation to

contribute is the "employer" for purposes of establishing withdrawal liability.[5]

In *Seaway*, we found that SPAD was not an employer because it had not signed a contract obliging it to contribute to the pension fund:

> In this case, it is undisputed that SPAD did not sign any collective bargaining agreements. Nor did it sign a shipping association agreement. Nor did SPAD sign the pension plan's trust agreement that established the contribution duty during the relevant period. Our review of the record does not reveal any contracts SPAD signed explicitly obligating it to make pension contributions. Thus, applying the relevant case law, SPAD is not obligated to contribute and is not an employer under the MPPAA.

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[5] In *Seaway*, we considered the possibility that entities would intentionally shift withdrawal liability:

> [The pension trustees] argue that true employers will simply require their managing agents to sign all relevant agreements, and then claim no obligation to contribute when the agent withdraws. There is nothing inherently improper in this, however, because parties may contract as they see fit, within certain limitations. A pension plan's proper recourse in such a situation is to assess withdrawal liability against the managing agent.

Seaway, 920 F.2d at 510.

We left open, in *Seaway*, the question of whether in the case of "an insolvent shell agent and a potentially fraudulent arrangement," we would look behind the contractual obligor to the "true employer." *Id.* Central States explicitly "does not argue here that Rheem's relationship with Knight was a sham." Appellant's Br. at 14 n.8. We therefore continue to leave that issue for another day.

Seaway, 920 F.2d at 509 (footnote omitted). The facts in *Seaway* are comparable to those in the instant case, and the holding in *Seaway* is directly applicable here. Knight, and not Rheem, was contractually bound to make pension contributions to Central States. The Agreement between Knight and Rheem stated that Knight would provide the benefits required by any collective bargaining agreement, and Knight, and not Rheem, signed the collective bargaining agreement creating the obligation to contribute to Central States. Further, Knight, and not Rheem, signed the trust agreement with Central States creating the obligation to make payments to Central States. Central States directs us to no document that could create a contractual obligation for Rheem to contribute to Central States.

Moreover, in keeping with these obligations, Knight made payments to Central States throughout Knight's association with Rheem. It was not until after Central States discovered that Knight was unable to pay the withdrawal liability that Central States notified Rheem of its belief that Rheem was liable for the withdrawal payment.

We find that *Seaway* is controlling in this case, and that, as a matter of law, Rheem was not contractually obliged to make contributions to Central States. Thus, under the *Seaway* definition of "employer" under the MPPAA, Rheem was not an employer. The district court did not err in granting summary judgment to Rheem on the grounds that Rheem was not an employer as a matter of law.

III. CONCLUSION

For the above reasons, we affirm the district court's dismissal of Central States' motion to dismiss, and the grant of Rheem's motion for summary judgment.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

RHEEM MANUFACTURING COMPANY PLAINTIFF

V. Civil No. 94-2056

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND DEFENDANT

MEMORANDUM OPINION

(Filed Dec. 08, 1994)

In this declaratory judgment action, Rheem Manufacturing Company (Rheem) seeks a declaration that it is not an "employer" under the Multiemployer Pension Plan Act Amendments of 1980 (MPPAA), codified at 29 U.S.C. §§ 1391-1453. The matter is currently before the court on Cross-motions for summary judgment, and the sole question before this court is whether a joint employer is an "employer" for purposes of assessing withdrawal liability under MPPAA.

This is a question of first impression for the Eighth Circuit, and there is no applicable direct precedent in any circuit. The court holds that the term "employer" under MPPAA does not include joint employers. Accordingly, summary judgment will be for plaintiff Rheem.[1]

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[1] *See generally* Brian H. Redmond, J.D., *What Constitutes "Employer" for Purposes of Employer's Withdrawal Liability Under Mult-employer Pension Plan Amendments Act of 1980 (29 USCS §§ 1381 et seq.*, 95 A.L.R.Fed. 703 (1989).

I. BACKGROUND

The defendant, Central States, Southeast & Southwest Areas Pension Fund (Central States) is a multi-employer pension plan. Rheem Manufacturing is a corporation that has for a long time operated a facility in Fort Smith, Arkansas, where it engages in the manufacture of heating and air conditioning equipment.

For over twenty years, from approximately June 6, 1965 to approximately June 6, 1991, Rheem leased a group of about fifteen (15) truck drivers from a company called Knight Associates (Knight) to haul finished products from Fort Smith to Rheem dealers nationwide. Pursuant to this lease, Knight furnished drivers to operate vehicles for Rheem, and Rheem remitted payments to Knight in accordance with the number of drivers leased and the number of miles driven. (See also Pl. Mot. Summ. J., Aff. of Hank Galske).

Under their agreement, both Knight and Rheem shared control over the daily working conditions of the truck drivers, and in fact, Rheem exercised the lion's share of control. In fact, Knight's sole business activity was to act as the employer for employees leased to Rheem; Knight's employees were selected for employment by Rheem; Knight never met or interviewed any of its leased employees prior to their being placed on Knight's payroll by direction of Rheem; Knight was required to hire and lease back to Rheem each person whose name was submitted to Knight by Rheem; Knight had no control over the working conditions of the leased employees; the leased employees did not wear Knight

uniforms, or drive Knight trucks, or carry Knight identification; Knight did not negotiate with the union over the terms and conditions of the leased employees work; Knight signed the collective bargaining agreement proffered by the union (the Teamsters National Master Freight Agreement) pursuant to its agreement with Rheem; Knight had no power to fire or replace any of the leased employees; and Knight would terminate the employment of a leased employee only upon the instruction to do so from Rheem. (Def. Resp. Pl. Mot. Summ. J., Aff. of Dorothy Alexander).

As for Knight's responsibilities under the agreement, Paragraph 6 provided that Knight would pay all wages and provide all benefits required by the applicable collective bargaining agreement. Pursuant to a collective bargaining agreement to which it was a party, Knight made contributions to Central States pension fund on behalf of the leased drivers.

On or about June 15, 1991, Rheem terminated its agreement with Knight and transferred the leased drivers to a company called Leaseway Personnel Corporation.[2] Knight subsequently ceased its contributions to Central States, and Central States notified Knight that it had incurred withdrawal liability under 29 U.S.C. § 1381. Central States then assessed Knight for $80,435.96 in withdrawal liability, and Knight paid $21,182.00 of that amount.

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[2] The entire controversy between the parties involves the period of time when Rheem leased its employees from Knight. As such, there is no need to discuss the parties' relationships with Leaseway in any detail.

To collect the remaining balance, Central States turned to Rheem. On January 28, 1994, Central States sent Rheem a formal Notice and Demand for Payment of Withdrawal Liability, which demanded that Rheem pay Knight's remaining withdrawal liability. Rheem maintained that it was not an "employer" under the MPPAA, that Knight was, and that Rheem thus was not liable for withdrawal payments. Central States countered that Rheem was liable for withdrawal liability as it was a joint employer with Knight.

On March 25, 1994, Rheem commenced this declaratory judgment action, asking this court to determine whether or not it is an "employer" under MPPAA. On May 13, 1994, this court denied defendant's motion to dismiss, holding that Rheem's status as an "employer" under MPPAA is properly resolved by a federal court, rather than an arbitrator. Both parties have now moved for summary judgment on the central question in the case – whether Rheem is an "employer" for purposes of assessing withdrawal liability under MPPAA.

II. THE MPPAA TERM "EMPLOYER"

Congress passed MPPAA as an amendment to ERISA to protect multiemployer pension plans from the financial burdens that result when a particular employer withdraws from the plan and leaves the plan with unfunded liabilities.

Under the provisions of the MPPAA, before a party can be assessed with withdrawal liability, that party must be an "employer." The relevant provision of MPPAA provides as follows.

> § 1381. Withdrawal liability established; criteria and definitions
>
> (a) If an *employer* withdraws from a multi-employer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. § 1381(a) (emphasis supplied).

MPPAA itself contains no definition of the term "employer," and determination of who is an "employer" for purposes of MPPAA is one for the courts. The Eighth Circuit recently defined the term employer as "a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants." *Seaway Port Authority v. Duluth-Superior ILA Marine*, 920 F.2d 503, 507 (8th Cir. 1990) (citations omitted), *cert. denied, Duluth-Superior ILA Marine v. Seaway Port Authority*, 501 U.S. 1218 (1991).

In applying the above definition, the Eighth Circuit has emphasized that the most important consideration is whether the alleged "employer" had an obligation to contribute and the nature of that obligation. In the words of the Eighth Circuit,

> There is a paucity of case law applying this definition [of "employer" under MPPAA]; what case law there is, however, . . . makes clear that the appropriate inquiry is *whether the alleged*

> *employer had an obligation to contribute and what was the nature of that obligation.*

Id. at 508 (emphasis supplied).

III. OBLIGATION TO CONTRIBUTE

Upon careful review of the Eighth Circuit's opinion in *Seaway, supra,* this court is convinced that, in order to be an "employer" under MPPAA, a party must have an obligation to contribute that is purely *contractual* in nature. That is, Rheem must have signed a contract obligating it to contribute to Central States, or it must be obligated by some other principle of traditional contract law, such as agency or alter ego theory. As will be discussed later, Central States contests this reading of *Seaway* and argues that an obligation to contribute need not be purely contractual, but may also be imposed by "applicable labor-management relations law."

In *Seaway,* an entity known as SPAD owned and operated a public marine terminal. SPAD contracted with a management company, NCTO, to act as the managing agent for all terminal operations. The contract provided that NCTO was to act as the employer for all operating personnel, including signing any necessary collective bargaining agreements. The contract also provided that NCTO would maintain a separate payroll account into which SPAD would deposit funds to enable NCTO to meet its payroll and fringe benefit expenses.

When NCTO and SPAD ended their relationship, NCTO withdrew from the pension plan, so the pension plan sought to hold SPAD accountable for NCTO's withdrawal liability. SPAD brought an action for declaratory

judgment that it was not an "employer" under MPPAA. The Eighth Circuit held that SPAD was not an "employer", because it had no contractual obligation to contribute.

> [A] review of the relevant case law reveals one fact common to all of the parties held subject to withdrawal liability: *they were contractually bound to make pension contributions,* either in collective bargaining agreements, general cargo agreements, or shipping association agreements. *Cf. also Laborers Local 938 v. B.R. Starnes Co.*, 827 F.2d 1454, 1456-57 (11th Cir. 1987) (per curiam) (holding that ERISA's definition of employer does not include persons other than signatory employers). In this case, it is undisputed that SPAD did not sign any collective bargaining agreements. . . . Our review of the record does not reveal any contracts SPAD signed explicitly obligating it to make pension contributions. Thus, applying relevant case law, SPAD is not obligated to contribute and is not an employer under MPPAA.

Seaway, 920 F.2d at 509.

The Eighth Circuit acknowledged that its ruling could allow parties to avoid withdrawal liability by carefully crafting their contracts, and that such results may appear unfair, but the court concluded that such appearances were tolerable.

> The Trustees contend that our requiring an entity to sign a contract explicitly obligating it to provide pension contributions before the entity is an "employer" under the MPPAA would defeat the purposes of ERISA. They argue that true employers will simply require

> their managing agents to sign all relevant agreements, and then claim no obligation to contribute when the agent withdraws. There is nothing inherently improper in this, however, because parties may contract as they see fit, within certain limitations. A pension plan's proper recourse in such a situation is to assess withdrawal liability against the managing agent. The Trustees further argue that true employers may hire insolvent sham agents, require them to sign all agreements, and thus avoid withdrawal liability. We are not faced with such a situation in this case.

Seaway, 920 F.2d at 510.

In sum, this court is convinced that the Eighth Circuit intended to limit the term "employer" under MPPAA to parties with a contractual obligation to contribute.[3]

IV. RHEEM HAD NO CONTRACTUAL OBLIGATION TO CONTRIBUTE

Applying the principles of *Seaway* to the present case, it appears that Rheem had no contractual obligation to contribute to the pension fund, and thus was not an "employer" under MPPAA. An analysis of the terms of

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[3] Although the court in *Seaway* does refer occasionally to the requirement of a signature on a contract, there is no reason to suppose that the signature of an agent or an alter ego, under traditional principles of contract law, would not work just as well. *See e.g., Seaway*, 920 F.2d at 507, 509 citing *Bowers v. Transportacion Maritima Mexicana*, 901 F.2d 258 (2d Cir. 1990) (alleged employer did not sign contract, but association with authority to bind employer did).

the leasing agreement between Rheem and Knight make it clear that Rheem successfully insulated itself from any contractual liability for employee wages and benefits. According to Paragraph 6 of the leasing agreement, Knight was the sole employer of the truck drivers and had sole responsibility for paying their wages and benefits. In the words of the leasing agreement, "the drivers are, and will continue to be, [Knight] employees. [Knight] will pay the drivers' wages and provide all of the benefits required by any applicable collective bargaining agreement which may be in effect from time to time."

Furthermore, Rheem's payments to Knight were calculated solely as a function of the number of drivers used and the number of miles driven, and apparently the amount of employee wages and benefits paid by Knight did not enter into the calculation. (See Schedule A of Leasing Agreement; Pls' Mot. Summ. J., Aff. of Hank Galske). Finally, Rheem never signed any collective bargaining agreement that obligated it to pay employee wages or benefits. In this manner, Rheem successfully insulated itself from contractual liability for employee wages and benefits.

These facts are very similar to those in *Seaway*, where the alleged "employer," SPAD, was not a party to any contract with the pension fund, and where the agreement between the alleged "employer" and its managing agent, NCTO, provided that "payroll expenses and fringe benefits are NCTO's responsibilities, not SPAD's." *Id.*, 920 F.2d at 509 n. 5.

V. JOINT EMPLOYER DOCTRINE

In response to plaintiff's contention that, in order to be an "employer" under MPPAA, a person must have a purely contractual obligation to contribute, Central States contends that MPPAA itself defines the term "obligation to contribute" to also include obligations imposed under "applicable labor-management relations law."

> § 1392. Obligation to contribute
>
> For purposes of [MPPAA], the term "obligation to contribute" means an obligation to contribute arising –
>
> (1) under one or more collective bargaining (or related) agreements, or
>
> *(2) as a result of a duty under applicable labor-management relations law,* but
>
> does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

42 U.S.C. § 1392 (emphasis supplied).

In reliance on this section, Central States argues that Rheem had an obligation to contribute "under applicable labor-management relations law" and is thus an "employer" under MPPAA. Central States' reaches this conclusion by arguing that (1) Knight and Rheem were joint employers of the truck drivers; (2) Knight had a contractual obligation to contribute under a collective bargaining agreement with the truck drivers' union; and (3) Rheem was bound by the same collective bargaining agreement as a non-signatory joint employer.

(For purposes of this opinion, this court will assume that Central States' version of labor-management relations law is accurate. However, the court emphasizes that it has not made any ruling that Knight and Rheem are joint employers, although from the evidence presented, such status seems quite possible.[4] Furthermore, even if Rheem and Knight are joint employers, the court emphasizes that it has not made any ruling that Rheem would be obligated under any collective bargaining agreements signed by Knight, although it is entirely possible that such liability exists under labor-management relations law.[5])

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[4] *See generally, Annotation, When are Separate Business Entities "Joint Employers" of Same Employees for Purposes of Application of Federal Labor Laws,* 73 A.L.R. Fed. 609 (1985).

[5] The precedent on this subject is nonconclusive, although the joint employer question has been raised in a surprising number of cases, many of them unreported. It is fascinating that an issue has been raised in litigation so many times, without a definitive answer ever being reached. Just in case the question need be resolved at a later stage of this litigation, the court provides the following survey of cases, some of which arise under the delinquent contributions provision of ERISA, and some of which arise under Section 301 of the Labor-Management Relations Act.

Many of the cases raising the question of whether a joint employer can be bound to a collective bargaining agreement never actually decide the issue. These cases simply dismiss the case on the grounds that there is no joint employer relationship. *See e.g. Local Union 98, IBEW v. Lott,* 1987 U.S. Dist. LEXIS 3777 (E.D. Pa. May 7, 1987); *Bechtel Constructors v. Detroit Carpenters Dist.,* 610 F.Supp. 1550, 1558-59 (D. Mich. 1985); *General Drivers, Etc., Loc. U. 89 v. P.S.C. of Indiana,* 705 F.2d 238 (7th Cir. 1983); *Kaylor v. Crown Zellerbach,* 643 F.2d 1362 (9th Cir. 1981); *Voss v. Supermail/Western Union,* 675 F.Supp. 1210, 1213 (S.D. Cal. 1987);

Assuming that Rheem is obligated to contribute as a joint employer under labor-management relations law, it

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Russom v. Sears, Roebuck, 415 F.Supp. 792, 796 (E.D. Mo. 1976), *aff'd*, 558 F.2d 439 (8th Cir.), *cert. denied*, 434 U.S. 955 (1977).

Some courts decide the issue definitively, one way or the other, but the precedent they rely upon does not actually support their position. *See e.g. Laborers Intern. Union v. HSA Contractors*, 728 F.Supp. 519 (E.D. Wis. 1989); *Newmark & Lewis, Inc. v. IBT*, 776 F.Supp. 102, 106 (E.D.N.Y. 1991); *Hardy v. Kaszycki & Sons Constr.*, 1994 U.S.Dist. LEXIS 15313 (S.D.N.Y. June 8, 1994).

Some courts reach a definitive holding that a joint employer cannot be held vicariously liable, and then rely upon a second holding to reinforce what they must consider to be a shaky first holding. *See e.g. Sheetmetal Workers Union v. Public Service Co.*, 771 F.2d 1071, 1074 (7th Cir. 1985); *USFL Players Ass'n, AFL-CIO v. USFL*, 650 F.Supp. 12, 15 (D. Or. 1986).

One court allowed a claim against a joint employer to survive a motion to dismiss, but in that case there was also a pendent claim of alter ego nonsignatory liability, which would have allowed the action to survive a motion to dismiss in any case even under traditional contract law. *Cruz v. Robert Abbey, Inc.*, 778 F.Supp. 605, 610-11 (E.D.N.Y. 1991).

For this court, the most accurate statement of the unsettled state of the law is provided by *Metropolitan Detroit Bricklayers Dist. Council v. J.E. Hoetger & Co.*, 672 F.2d 580, 583, n. 5 (6th Cir. 1982). In that case, the court dismisses a claim against an alleged joint employer, and then adds that

> Even if [defendant] Hoetger were a joint employer, it may not necessarily follow, in the absence of Hoetger's contractually undertaking liability under the collective bargaining agreement, that it would be liable to appellees for the fringe benefits provided by the agreement. Because we decide that Hoetger and Hawkins were not joint employers, it is not necessary to reach that issue."

In short, it is hopeless to look for precedent on this issue, and the court will have to return to first principles to decide the issue should it ever again be presented.

still would not be an "employer" under MPPAA. After careful review of *Seaway*, this court concludes that a non-contractual obligation to contribute incurred as a joint employer does not make a person an "employer" under MPPAA.

The court reaches this conclusion for two reasons. In the first place, an opposite holding would conflict with the *Seaway's* clear requirement that an "employer" under MPPAA must have a purely contractual obligation to contribute. And second, an opposite holding would conflict with *Seaway's* requirement that an "employer" under MPPAA must be either a "direct employer" or acting "in the interest of an employer." The court will now discuss each reason in turn.

First of all, a joint employer with a non-contractual obligation to contribute is not an "employer" under MPPAA, because *Seaway* holds that an alleged "employer" 's obligation to contribute must be contractual in nature. To the extent that labor-management relations law creates a range of liability broader than what exists under contract law, it is not a part of MPPAA's definition of an "employer".

In the second place, a joint employer with a non-contractual obligation to contribute is not an "employer" under MPPAA, because *Seaway* requires that an "employer" must be either: (1) a direct employer, or (2) acting "in the interest of an employer." *Seaway*, 920 F.2d at 507. Thus, even if Rheem has a non-contractual obligation to contribute as a joint employer, it still would not be an "employer" under MPPAA because: (1) it would not obligated as a "direct employer" of the leased employees,

because Knight was the direct employer; and (2) it would not be obligated "in the interest of the employer," but rather in its own interest as joint employer. (If Rheem had contractually agreed to contribute, this definitional problem would be avoided.) Thus, Central States is basically arguing that Rheem had an obligation to contribute, not as a "direct employer," and not "in the interest of the employer," but rather as a "joint employer." the *Seaway* definition of "employer" does not appear to allow for this possibility. In fact, the use of the term "direct employer" by the Eighth Circuit is evidence of an intention to exclude the use of the joint employer doctrine in the MPPAA context.

For these reasons, the court holds that a joint employer with a non-contractual obligation to contribute to a pension fund is not an "employer" under MPPAA.

VI. CONCLUSION

The court need not spend any time speculating on the reasons why the Eighth Circuit decided, albeit implicitly, that the joint employer doctrine is not a part of MPPAA's definition of "employer". It may be that the joint employer doctrine is not "applicable labor-management relations law." (The term "applicable" indicates that the courts have some leeway in deciding what is applicable and what is not.) On the other hand, it may be that the Eighth Circuit defined the term "employer" as a matter of federal common law without ever intending to refer to the statutory definition of the term "obligation to contribute." In any case, all this court must do is determine that *Seaway* precludes application of the joint

employer doctrine; it need not speculate on exactly how or why the Eighth Circuit reached that result.

The court notes that three cases have previously addressed the withdrawal liability of joint employers under MPPAA, although these cases were not cited by the parties. Two of them reached a result directly opposite to the one reached by this court today, but these cases utilized a definition of "employer" under MPPAA which was expressly rejected by the Eighth Circuit in *Seaway. Central Pennsylvania Teamster's Pension Fund v. Service Group, Inc.*, 645 F.Supp. 996 (E.D. Pa. 1985), *disapproved by Seaway, supra; American Stevedoring Corp. v. Burlington Industries, Inc.*, No. 85-4180 (N.D. Ill. December 1, 1985). A third case raised the joint employer question, but the case was dismissed on the grounds that the parties before the court were not joint employers. *Refined Sugars, Inc. v. Local 807 Labor-Management Pension Fund*, 632 F. Supp. 630 (S.D.N.Y. 1986).

The Pension Benefits Guaranty Corporation has also issued two opinions directly addressing whether a joint employer is an "employer" under MPPAA. Both opinions reached a result directly opposite to the one reached by this court today, but these opinions do not provide authority for the federal courts. Pension Benefits Guaranty Board Opinion Nos. 85-14 and 86-10.

IT IS SO ORDERED.

/s/ H. Franklin Waters
United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

RHEEM MANUFACTURING COMPANY PLAINTIFF

v. Civil No. 94-2056

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND DEFENDANT

MEMORANDUM OPINION AND ORDER

This is a declaratory judgment action in which Rheem Manufacturing Company seeks a declaration that it is not an employer for purposes of the assessment of withdrawal liability under the provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. §§ 1381-1461. The matter is currently before the court on the defendant's motion to dismiss. The sole issue is whether a federal district court or an arbitrator should resolve the question of whether a corporate entity, in this instance, Rheem Manufacturing, is an employer subject to withdrawal liability under MPPAA.

From July of 1965 until June of 1991, Rheem was party to a driver service agreement with Knight Associates. Knight furnished drivers to operate vehicles for Rheem and Rheem remitted payment to Knight in accordance with the terms of the agreement. The contract provided that Knight would pay all wages and provide all of the benefits required by any applicable collective bargaining agreement. Rheem alleges that Knight began or continued contributing to a pension plan on behalf of the drivers pursuant to the provisions of a collective

bargaining agreement. When Knight ceased making contributions on behalf of drivers furnished to Rheem, Central States assessed Knight $80,435.96 in withdrawal liability. Central States was able to collect $21,182.00 from Knight.

From June of 1991 until August 15, 1992, Leaseway Personnel Corporation began furnishing drivers to Rheem. There was no written agreement between Rheem and Leaseway. Rheem was merely billed for the services. The drivers furnished by Leaseway participated in the pension plan.

Central States, Southeast and Southwest Area Pension Fund (hereinafter Central States) is a pension fund set up to provide benefits to employees in various bargaining units. The drivers acquired from both Knight and Leaseway participated in the pension plan. All contributions to Central States on behalf of the drivers furnished to Rheem have ceased.

On January 28, 1994, Rheem received a notice and demand for payment of withdrawal liability from Central States. Central States determined that Rheem exercised such close control over its drivers that it was a joint employer with Knight for purposes of labor law and remained a joint employer while its drivers were furnished by Leaseway. The notice demanded $91,069.41 as payment of withdrawal liability pursuant to 29 U.S.C. §1399(b). Thereafter Rheem filed this action seeking a declaration that it is not an employer subject to withdrawal liability. As it is not an employer, Rheem contends the mandatory arbitration procedure set forth in the MPPAA does not apply.

Central States has moved to dismiss this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that the dispute is committed by statute to compulsory arbitration. Central States argues the present action is premature as Rheem has failed to exhaust the MPPAA's mandatory arbitration procedures and is therefore entitled to no relief in this court.

One of the principal purposes for the enactment of the Employee Retirement Income Security Act (ERISA) was "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720, 104 S.Ct. 2709, 2713, 81 L.Ed.2d 601 (1984). "Congress wanted to guarantee that 'if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it.' " *Id., quoting, Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980).

To this end, "Congress created the Pension Benefit Guaranty Corporation (PBGC), which insures certain pension plans and provides benefits to underfunded plans upon termination." *Seaway Port Authority v. Duluth-Superior ILA Marine*, 920 F.2d 503, 505 (8th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2827, 115 L.Ed.2d 997 (1991). After several years, the PBGC issued a report finding that "ERISA did not adequately protect plans from the adverse consequences that resulted when individual employers terminate their participation in, or withdraw from, multiemployer plans." *PBGC*, 467 U.S. at 722. In

order to address these concerns Congress in 1980 passed the Multiemployer Pension Plan Amendments Act. The amendments

> added subtitle E to Title IV of ERISA. The MPPAA establishes withdrawal liability for employers that cease participation in a multi-employer pension plan, as well as means for computing that liability. Complete withdrawal from a multiemployer pension plan occurs when an employer either permanently ceases to have an obligation to contribute under the plan or permanently ceases all operations covered under the plan. . . . At the time that an employer withdraws from a plan, the plan is required by the MPPAA to determine the amount of the employer's withdrawal liability, and notify the employer of that amount.

Connors v. B.M.C. Coal Co., 634 F. Supp. 74, 75 (D.D.C. 1986) (citations omitted). At withdrawal an employer is required to make a final payment to the plan to cover certain unfunded vested benefits. 29 U.S.C. §1381(a), §1383(e). The amount of the assessment is determined by statute. 29 U.S.C. §1381(b)(1), §1391. The plan is required to notify the employer of the amount of withdrawal liability assessed, submit to the employer a schedule for payment, and demand from the employer payment in accordance with the schedule. 29 U.S.C. §1399(b)(1).

The employer may challenge a determination within 90 days of the receipt of the notice of determination and request review from the plan sponsor. 29 U.S.C. §1399(b)(2)(A). If a dispute remains after this review, either party may initiate arbitration proceedings. In particular, the MPPAA provides for mandatory arbitration of

"[a]ny dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination under sections 1381 through 1399. . . . " 29 U.S.C. §1401(a).

"The arbitration requirement is an important component of MPPAA's scheme to secure the financial health of multiemployer pension plans. Arbitration of withdrawal liability disputes substantially reduces the expenses incurred by multiemployer plans while it bears a burden that would otherwise fall on the federal courts." *Flying Tiger Line v. Teamsters Pension Tr. Fund*, 830 F.2d 1241, 1248 (3d Cir. 1987). Judicial review of a determination reached through arbitration may be sought within 30 days of the arbitration award. 29 U.S.C. §1401(b)(2).

If neither party requests arbitration, the withdrawal liability assessment becomes due in accordance with the schedule and the plan sponsor may sue for collection under the schedule. 29 U.S.C. §1401(b)(1). "Regardless of whether the employer requests review by a plan's trustees or initiates arbitration, however, the employer must begin making interim payments of the withdrawal liability in accordance with the plan's schedule within 60 days of notice of liability." *Flying Tiger Line v. Teamsters Pension Tr. Fund*, 830 F.2d 1241, 1244 (3d Cir. 1987).

Central States argues that §1401(a)(1) mandates the arbitration of this dispute. It is contended that no exceptions exist to the arbitration requirement and that any failure to arbitrate results in a waiver of withdrawal liability defenses. Central States contends that the courts have made no exceptions for purely legal questions or questions of statutory interpretation and have strictly

adhered to the unequivocal rule of arbitration first before resort to federal court. It therefore argues that the question of whether or not Rheem is an employer having an obligation to contribute to Central States is an issue that must be submitted to arbitration. We are told that the question of whether Rheem was a joint employer is an intensely fact-bound question of the kind that labor arbitrators and not the courts routinely handle. Central States requests the dismissal of this action. Alternatively, Central States requests that the action be stayed pending the outcome of arbitration proceedings.

Rheem argues that §1401 only compels an "employer" to arbitrate and that the court must first determine whether or not Rheem is an "employer." Until Rheem is determined to be an employer, it argues §1401 does not apply and the arbitrator would not have jurisdiction over it. As the question of whether Rheem was ever an employer for MPPAA purposes is a purely legal question, Rheem argues the arbitration requirement is inapplicable.

In *Seaway Port Authority v. Duluth-Superior ILA Marine*, 920 F.2d 503 (8th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2827, 115 L.Ed.2d 997 (1991), the Seaway Port Authority of Duluth (SPAD) sought a declaration that it was not an employer for purposes of ERISA withdrawal. The trustees of the plan at issue and SPAD agreed that SPAD would seek declaratory relief in federal district court to determine whether SPAD was an employer for purposes of withdrawal liability. *Id.* at 505. The court noting this was a question of first impression in the Eighth Circuit reviewed MPPAA's statutory scheme. It was noted that the provisions of the MPPAA do not

define the term "employer." The court rejected the application of ERISA's definition of employer contained in Title I of the statute to the MPPAA and held that "the definition of employer under the MPPAA is for the courts to decide." *Id.* at 507. The court noted that the definition of employer under the MPPAA is a question of law. *Id.* at 506.

The Eighth Circuit then adopted the definition of "employer" articulated by the Second Circuit in *Korea Shipping Corp. v. New York Shipping Ass'n-Int'l Longshoremen's Ass'n Pension Trust Fund,* 880 F.2d 1531, 1537 (2d Cir. 1989). The court in *Korea Shipping* defined the term "employer" in 29 U.S.C. §1381(a) to mean "a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants." *Korea Shipping,* 880 F.2d at 1537. The Eighth Circuit noted that in each case where an entity was held subject to withdrawal liability they were contractually bound to make pension contributions. *Seaway,* 920 F.2d at 509. There was no discussion in *Seaway* regarding the arbitration provisions of the MPPAA. In *Vaughn v. Sexton,* 975 F.2d 498 (8th Cir. 1992), *cert. denied,* ___ U.S. ___, 113 S.Ct. 1268, 122 L.Ed.2d 664 (1993), the Eighth Circuit discussed the arbitration procedures and held that an employer had waived the defense of laches when it did not demand arbitration under the statutory scheme.

In *Flying Tiger Line v. Teamsters Pension Tr. Fund,* 830 F.2d 1241 (3d Cir. 1987), Tiger presented an argument similar to that presented here. Tiger argued that the question of whether it was a MPPAA employer was a predicate issue to be resolved in federal district court before an arbitrator could assert jurisdiction under the MPPAA.

The employer status question in that case arose in the context of a dispute concerning the so-called "evade or avoid" provisions of the MPPAA. 29 U.S.C. §1392(c). "In determining whether a withdrawal has occurred, MPPAA explicitly provides that any transaction designed to 'evade or avoid' withdrawal liability should be ignored: '[i]f a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.' " *Flying Tiger,* 830 F.2d at 1244, *quoting,* 29 U.S.C. §1392(c).

The district court certified the following question for appeal:

> May a corporation that legitimately believes its status as a MPPAA "employer" is doubtful have that issue resolved by a federal court in a timely declaratory action, wherein the federal district court will determine the legal and factual issues necessary for a determination that the corporation is subject to MPPAA liability and procedures, or must the issue of MPPAA applicability and liability instead be determined by a MPPAA arbitrator?

Flying Tiger, 830 F.2d at 1247. The Third Circuit answered the question negatively holding that

> where the party against which withdrawal liability is being asserted was certainly part of the controlled group of an employer subject to MPPAA at some point in time, and where the issues in dispute fall within the purview of MPPAA provisions that are explicitly designated

> for arbitration, the Act's dispute resolution procedures must be followed.

Id. at 1247.

In rejecting Tiger's argument that they were entitled to a judicial resolution of their legal status as an employer before being compelled to arbitrate the court noted:

> Admittedly, section 1401 refers to "employers"; the more fundamental question, however, concerns what needs to be decided to dispose of Count I of Tiger's complaint. Tiger claims that the issue is whether it was an "employer" at the time Hall's withdrew from the plans. The multiemployer pension funds argue, and the district court ultimately determined, that Tiger's status can only be defined by deciding whether the January 1985 sale was a sham transaction designed to relieve Tiger of Hall's withdrawal liability. Because we agree that the central dispute between Tiger and the funds concerns whether the sale must be ignored under MPPAA's "evade or avoid" provision, we are guided by the Act's language that clearly states that "[a] dispute between an employer and the plan sponsor of a multiemployer plan *concerning a determination made under sections 1381 and 1399 of this title* shall be resolved through arbitration." 29 U.S.C. §1401(a)(1) (1982) (emphasis added). We agree with the district court that "characterizing the issue to be decided as whether or not Tiger was an 'employer' is a broad brush description of a specific issue. The case really turns on the determination of the 'evade or avoid' question, a question properly before the arbitrator.

Id. at 1247-48.

The court recognized that a declaratory judgment action would be appropriate when the legal issue was whether a given entity had *become* an employer within the meaning of the MPPAA. In the case before it, the question was whether Tiger ceased to be a MPPAA employer in time to avoid liability for another's withdrawal. This latter context raised an issue under MPPAA's evade or avoid provision. The court found this to be an important distinction.

The court also referred to *Banner Indus., Inc. v. Central States, Southeast & Southwest Areas Pension Fund*, 657 F. Supp. 875, *issues certified for appeal*, 663 F. Supp. 1290, *subsequent opinion*, 663 F. Supp. 1292 (N.D. Ill. 1987), *aff'd*, 875 F.2d 1285 (7th Cir. 1989), *cert. denied*, 493 U.S. 1003, 110 S.Ct. 563, 107 L.Ed.2d 558 (1989) in which the court noted that

> [T]he issue of whether one remains an employer on the date of withdrawal is not the same issue as whether one ever became an "employer" for the purposes of ERISA generally and MPPAA in particular. The latter is an issue for the court since its resolution determines the arbitrator's authority over the dispute. The former is an issue for the arbitrator since its resolution turns on the applicability of MPPAA provisions relating to employer withdrawals – provisions Congress specifically placed within the purview of the arbitrator.

Banner, 657 F. Supp. at 882 (footnote omitted). In *Central Transp., Inc. v. Central States, Southeast & Southwest Areas Pension Fund*, 639 F. Supp. 788 (E.D. Tenn. 1986), *aff'd without opinion*, 816 F.2d 678 (6th Cir. 1986) the court noted the issue of whether an entity was an employer for

MPPAA purposes was analogous to whether or not there is a contractual duty to arbitrate which issue is subject to judicial determination prior to compulsory submission of an issue to arbitration. *Id.* at 793. *See also Central States Pension Fund v. Slotky*, 956 F.2d 1369 (7th Cir. 1992) (arbitration requirement presupposes a determination that the dispute is with an employer); *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115 (4th Cir. 1991).

While "[c]ourts have treated § 1401(a)'s direction to 'arbitrate first' as a general command; nevertheless, they have usually refrained from interpreting § 1401(a) as an absolute jurisdictional bar." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 122 (4th Cir. 1991). Section 1401(a) has been regarded as an exhaustion of administrative remedies requirement. *Id.* Federal courts have intervened and taken jurisdiction prior to arbitration in the rare case where an entity has raised a legitimate legal question of statutory interpretation which must be resolved in order to ascertain whether the statutory scheme applies to that entity at all. *Id.* This limited exception to the "statutory arbitration command has been found applicable only in cases where the employer claims that it did not *become* an employer for MPPAA purposes in time to acquire withdrawal liability, or where the employer asserts that it was *never* an MPPAA employer and thus is not subject to ERISA's dispute resolution procedures." *Id.* (citations omitted).

This is precisely the issue before us. Rheem argues here that it never became an employer for MPPAA withdrawal liability purposes. The question is a legal one which the Eighth Circuit has indicated is for the courts to

decide. We do not believe the purposes of §1401's arbitration provision will be advanced by compelling arbitration when an entity legitimately argues it never became an "employer" for MPPAA purposes. Rather, the court will determine this very limited issue. If the issue is resolved adversely to Rheem, Rheem will then be required to arbitrate any disputes between it and the plan.

The motion to dismiss is denied. It appears that this issue is one that would be amenable to resolution on the basis of stipulated facts and the briefs of the parties. The parties are directed to confer and advise the court within eleven days whether or not they believe the matter could be submitted to the court in this manner.

Dated: May 13, 1994

/s/ H. Franklin Wallis
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-1073WAFS

Rheem Manufacturing Company,	*	
Appellee,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
vs.	*	
Central States Southeast and Areas Pension Fund,	*	
Appellant,	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 22, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

(LOGO) Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C.
20006-1806

MAY 28 1985

This responds to your letter regarding the "joint employer doctrine" under the National Labor Relations Act ("NLRA") as it may apply under Title IV of ERISA. Specifically, you ask whether a company that is not a signatory to an agreement under which contributions are required to be made to a multiemployer pension plan, but is a "joint employer" for purposes of the NLRA with such a company, can be liable for a complete or a partial withdrawal under Section 4201 of ERISA.

The company whose liability is at issue ("your client") leases its employees from a firm that specializes in employee leasing (the "leasing firm"). The leasing firm is a signatory to a collective bargaining agreement pursuant to which it contributes to a multiemployer pension plan (the "Plan"). Your client has neither signed the agreement nor contributed to the Plan. There is no corporate affiliation or common ownership between the two companies. However, you state that your client exercises such close supervision and control over the day-to-day working conditions of the leased employees that in your opinion your client is a joint employer for purposes of the NLRA. Further, you represent for purposes of your inquiry to the PBGC that, as a joint employer, your client is bound under labor law by any collective bargaining agreement covering the leased employees, and therefore may, like the leasing firm, be obligated to contribute to the Plan. You ask whether your client would be liable under the

withdrawal liability provisions of Title IV of ERISA if, because of changes in business conditions, your client terminates the leasing arrangement.

Under Title IV an employer is liable for a withdrawal from a multiemployer plan when it permanently ceases to have an obligation to contribute or permanently ceases all covered operations under the plan. Section 4203 of ERISA. Section 4212(a) of ERISA defines "obligation to contribute" as an obligation arising under one or more collective bargaining agreements or as a result of a duty under applicable labor-management relations law.

You have represented that your client is an employer (joint employer) which may have an obligation under the NLRA to contribute to the Plan. If such an obligation were found to exist, your client would be subject to Title IV's withdrawal liability provisions. Thus, a permanent cessation of its obligation to contribute would constitute a withdrawal from the Plan, and its liability would be calculated in accordance with Section 4201 of ERISA. Please note, however, that the amount of an employer's liability is based on its allocable share of unfunded vested benefits determined under Section 4211 of ERISA. This amount is generally proportional to contributions required to be made by the employer. Consequently, if no contributions were required to be made by the employer, there would ordinarily be no liability.

You have also stated that the termination of your client's leasing arrangement may result in the leasing company laying off its employees, resulting in a complete or partial withdrawal by the leasing company. You ask whether this will affect the potential liability of your client. You have

represented, however, that your client is not a trade or business which is under common control with the leasing firm within the meaning of Section 4001(b) of ERISA. Thus, your client and the leasing firm would not constitute a single employer and their obligations and liabilities under Title IV would be determined separately.

Of course, the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan and the identity of the liable employer lies with the plan sponsor. ERISA further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved by arbitration subject to review in the courts.

I hope this response is of assistance. If you have further questions concerning this matter, please contact ___ of my staff at the above address or at (202) 254-4873.

Very truly yours,

/s/ Edward R. Mackiewicz
Edward R. Mackiewicz
General Counsel

No. 86-10
April 10, 1986

Dear:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation regarding the withdrawal liability of "joint employers" under Title IV of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Specifically, you ask whether a withdrawal occurs when an employer ceases making contributions to a multiemployer plan because it entered into an arrangement with another employer that provides employees and that makes some or all of the contributions for those employees. You also ask what contribution history is used in determining the withdrawal liability of the first employer when that employer contributed directly to a multiemployer plan only prior to the enactment of the Multiemployer Pension Plan Amendments Act ("MPPAA") and at all times after enactment was a joint employer with the other company, which eventually withdrew from the plan.

You represent that prior to 1977, A made contributions directly to the Fund. In 1977, A entered into a leasing agreement with B and B began making some contributions to the Fund for the employees it provided to A. A also made substantial contributions to the fund for those employees during its agreement with B.

B and A terminated their agreement in 1979, and C entered into an agreement with A. Under their agreement, C made all of the contributions to the fund for the employees it provided A. C withdrew from the Fund in

1982. There is no corporate affiliation or common ownership between A and C or A and B. However, you state that A exercised such close supervision and control over the day-to-day working conditions of the employees provided by C and B that in your opinion A was a joint employer for purposes of the NLRA. Further, you represent that as a joint employer A was bound under labor law by any collective bargaining agreement covering the employees provided by C and B, and therefore may, like C and B, have been obligated to contribute to the Plan.

Your first question is whether a withdrawal occurred when A entered into the agreements first with B and then with C. Under section 4203(a) of ERISA, a withdrawal from a multiemployer plan occurs when an employer permanently ceases to have an obligation to contribute or permanently ceases all covered operations under the plan. Section 4212(a) of ERISA defines "obligation to contribute" as an obligation arising under one or more collective bargaining agreements or as a result of a duty under applicable labor-management relations law.

The PBGC addressed a very similar question in Opinion Letter 85-14 [13 BPR 30]. In that letter, we concluded that if the first employer was a joint employer with the second employer with whom it entered into the leasing agreement, and if as a result the first employer had an obligation to contribute to the plan, then the first employer would incur a withdrawal upon the permanent cessation of its obligation to contribute. In the instant case, that would have occurred when C permanently ceased to be obligated to contribute. It follows, therefore, that A would not have incurred a withdrawal when it entered into the leasing agreements. This conclusion, of

course, assumes that A was a joint employer with C and did have a duty to contribute under the NLRA.

Your other question is how withdrawal liability should be calculated for that withdrawal. The amount of an employer's withdrawal liability is based on its allocable share of unfunded vested benefits determined under section 4211 of ERISA. This amount is generally proportional to contributions required to be made by the employer. Since neither A and C nor A and B appear to constitute a single employer within the meaning of section 4001(b) of ERISA, A's obligations and liabilities under Title IV would be determined separately from B's and C's.

Since B withdrew from the Fund prior to enactment of MPPAA it is not subject to withdrawal liability. While C withdrew after enactment of MPPAA, you represent that C was not required to contribute to the Fund prior to its relationship with A. Therefore, C's contribution history should encompass only the years after the agreement. With respect to A, the question is whether the years after its agreement with C, when it was obligated to contribute as a joint employer but was not required directly to contribute to the Fund, should be included in its contribution history. You contend that these years should be included.

Opinion Letter 85-14 also addressed this issue and concluded that there is a difference between "an obligation to contribute" and "contributions required to be made by the employer", the latter being the operative term for purposes of determining an employer's allocable share under section 4211. "An obligation to contribute" is

a broader term that includes both the present requirement to make contributions to a plan and an obligation to contribute that is contingent upon an event that has not yet occurred.

It is, therefore, our opinion that years in which A had an obligation to contribute to the Fund but was not required to contribute should not be included in its contribution history for the purpose of calculating its withdrawal liability. Since you represent that A was required to contribute to the Fund only in the years prior to its agreement with C, those are the only years that should be included in its contribution history for purposes of calculating its withdrawal liability.

I hope this has been of assistance. If you have further questions please contact the attorney handling this matter, Steven Rothenberg, of the Corporate Policy and Regulations Department. His telephone number is (202) 956-5050.

Very truly yours,

Edward R. Mackiewicz
General Counsel